NO. 48590-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOHN WORTHINGTON,

Appellant,

v.

WESTNET,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-2-02698-3

BRIEF OF RESPONDENT WESTNET

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I. COUNTERSTATEMENT OF THE ISSUES

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   b. Another administrative entity had capably fulfilled all Public Records Act (PRA) obligations related to WestNET joint operations such that dismissal did not frustrate the purposes of the PRA; and

   c. Worthington was collaterally estopped from amending his complaint to identify Kitsap County as a real party in interest?

2. Whether the trial court properly denied Worthington's motion for summary judgment because his motion sought judgment for actions not complained of in his complaint and sought relief that the court had no legal authority to grant?

3. Whether the trial court properly denied Worthington's motion to strike WestNET's pleadings in their entirety because the court had no authority to strike the pleadings from the record, and

Worthington provided no authority to support his request?

4. Whether the trial court properly denied Worthington's motion for CR 11 sanctions against WestNET's counsel because the pleadings filed by counsel on WestNET's behalf were well grounded in fact and were warranted by existing law?

5. Whether the trial court properly found that the RPC 3.3(d) declaration of Ione S. George failed to give rise to any material question of fact as to whether WestNET was a legal entity subject to suit or was acting in conformity with its interlocal agreement, because the subject of the declaration related to the actions of the Office of the Prosecuting Attorney, not that of WestNET, and because the declaration related to drug forfeiture proceedings, which by statute may be initiated by police agencies, which are not free-standing legal entities?

6. Whether the trial court properly denied Worthington's motion for reconsideration of the summary judgment orders where he provided the court with no newly discovered evidence in support of his motion that could not previously have been discovered with reasonable diligence, or which would have warranted reconsideration of the court's prior ruling?

7. Whether the trial court properly denied Worthington's motion to vacate the summary judgment and sanction orders where Worthington again provided no newly discovered evidence that could not previously have been discovered with due diligence, or any other reason justifying relief from operation of the judgment?

II. STATEMENT OF THE CASE

The present appeal is part of a lengthy history of claims and litigation by Worthington against Kitsap County and the West Sound Narcotics Enforcement Team (WestNET). The history of this litigation is necessary to understand the context of the current appeal.

A. INTITIAL 2007 CLAIM AND SETTLEMENT AGREEMENT

On July 6, 2007, Plaintiff/Appellant John Worthington delivered a claim for damages to the Kitsap County Department of Risk Management. CP 1899-1939. His claim described injury that he alleged to have suffered when contacted by WestNET[1] representatives at his home on January 12, 2007. *Id.* Ultimately, on July 1, 2008, Kitsap County entered into a settlement agreement with Worthington. CP 1899-1902; 1962-1964. Through the settlement agreement, Worthington forever released Kitsap County:

[1] WestNET is a drug task force comprised of several local and state law enforcement agencies that was created by Interlocal Agreement. CP 1899-1902; 1941-1961.

> [F]rom all claims and causes of actions, including, but not limited to, all claims for damages, penalties, attorneys fees and costs and any forms of relief of any kind whatsoever, whether presently known or unknown, that may ever be asserted by [John Worthington]...that in any way arise out of facts related to, or resulting from ...or (c) stemming from or related to the incident described in the claim which [Worthington] described in the claim which [he] filed on or about July 6, 2007 . . .

Id.

B. FIRST PIERCE COUNTY LAWSUIT

In May 2011, Worthington filed his first civil action against Kitsap County in violation of the settlement agreement. In Pierce County Superior Court Cause No. 11-2-09032-4, Worthington named Kitsap County and the Kitsap County Sheriff's Office[2] as defendants. The complaint alleged the County violated the Public Records Act when it responded to his requests for documents related to the incident involved in his 2007 claim for damages. CP 1899-1902; 1965-1972. The records request in question began with his request dated February 5, 2010, which was directed to Lt. Collings of the Kitsap County Sheriff's Office.[3] *Id.* He complained that the response given on March 26, 2010 was inadequate. *Id.*

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[2] Of note, a department of a county is not an entity subject to suit. *Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792 (1990) ("[I]n a legal action involving a county, the county itself is the only legal entity capable of suing and being sued.")

[3] This is the same public records request underlying the instant action.

On May 19, 2011, Kitsap County reminded Worthington in writing that he had entered into a settlement agreement with the County by which he had waived his right to sue the County for causes of action or claims for relief that related in any manner to the incident complained of in his prior claim for damages. CP 1899-1902; 1973-1975. He was advised that if he pursued the Pierce County Superior Court action further, the County would seek CR 11 sanctions against him. *Id.* Worthington subsequently voluntarily dismissed the suit. CP 1899-1902; 1976-1977.

C. SECOND PIERCE COUNTY LAWSUIT

Worthington then filed a second suit in Pierce County, this one under Superior Court Cause Number 11-2-13236-1. CP 1899-1902; 1978-1990. This suit named WestNET as a defendant instead of Kitsap County, but alleged the same violations of the PRA as had been alleged in his previous complaint. *Id.* The State of Washington, the City of Poulsbo and the City of Bremerton were named as co-defendants.

The interlocal agreement that established WestNET provided that each member agency was responsible for its own actions. Additionally, each agency agreed to hold harmless, defend and indemnify the other parties to the agreement in any action arising from the acts of that agency's employee. Thus, when WestNET was named in an action for alleged public records violations by the County, it was the County's

responsibility to defend against the claim. CP 1899-1902; 1941-1961. Accordingly, the Kitsap County Prosecuting Attorney's Office appeared on behalf of defendant WestNET, and moved for dismissal as WestNET is not an entity subject to suit. CP 1899-1902; 1991-1998.

The Piece County court did not rule upon WestNET's motion for dismissal, but instead transferred venue to Kitsap County Superior Court, and ordered Worthington to pay the cost of transferring the records and files to the Kitsap County Superior Court Clerk. The court reserved ruling on the issue of the imposition of legal fees for the Kitsap County judge, and directed that transfer of venue should be completed within 60 days of the court's order transferring venue. CP 1899-1902; 1999-2002.

Transfer of venue was never effected, and the action against WestNET, the State of Washington, and the Cities of Poulsbo and Bremerton was not re-initiated in Kitsap County Superior Court. CP 1899-1902.

D. FIRST KITSAP COUNTY LAWSUIT

Instead, Worthington filed the lawsuit that is the subject of the present appeal in Kitsap County Superior Court. The complaint again named WestNET as the defendant, but premised this action upon the same alleged violations of the PRA by Kitsap County Sheriff's Office. CP 1899-1902; 2003-2014. Worthington filed a first amended complaint on

December 19, 2011, which included a declaration executed by Worthington with numerous supporting documents attached. CP 1-11.

WestNET moved for dismissal for failure to state a claim upon which relief could be granted. It argued that the amended complaint failed to identify WestNET in any capacity, and further that under no set of facts could Worthington identify WestNET as an entity subject to suit as a public entity.

The court initially denied the motion. WestNET filed a motion for reconsideration, and provided the court with the interlocal drug task force agreement that had established WestNET. The trial court granted the motion for reconsideration, and dismissed Worthington's claims pursuant to CR 12(b)(6).

E. FIRST APPEAL

Worthington appealed the dismissal to this Court. The Court held that WestNET was not a separate legal entity subject to suit, and affirmed the trial court's dismissal of Worthington's complaint for failure to state a claim. *Worthington v. WestNET*, 179 Wn.App.788, 320 P.3d 721 (2014).

F. SECOND KITSAP LAWSUIT

Shortly thereafter, Worthington initiated a yet another suit in Kitsap County Superior Court under cause no. 14-2-00474-7. Under this fourth action, Worthington named, among others, Kitsap County as the

defendant instead of WestNET, but reiterated the same PRA claims he had made in each of his prior suits (including the present action). CP 1899-1902; 2003-2014. The County successfully moved for dismissal of the action. CP 2015-30; 2031-34; 2035-44. Worthington appealed, and this Court affirmed. *Worthington v. Bremerton*, 193 Wn. App. 1017 (2016) (unpublished). Worthington sought review, and the matter is presently pending. *Worthington v. Bremerton*, Supreme Court No. 93173-9.

G. SUPREME COURT REMAND

Worthington meanwhile sought review from this Court's previous decision in the present matter. The Supreme Court reversed and remanded the matter for further hearing. *Worthington v. WestNET,* 182 Wn.2d 500, 341 P.3d 995 (2015). The Supreme Court directed the trial court to conduct further factual findings to determine if the WestNET task force had behaved consistently with its non-entity designation. *Id.* It further ordered the trial court to determine whether under RCW 39.34.030(5)(a), another administrative entity was capable of fulfilling WestNET's PRA obligations as they related to joint operations, such that dismissal of the present action would not frustrate the purposes of the PRA. *Id.*

H. PROCEEDINGS ON REMAND

After remand, further discovery was held and both parties filed

motions for summary judgment. WestNET's motion was granted, Worthington's was denied and the claims were once again dismissed with prejudice. CP 710-711. While the summary judgment motions were pending, Worthington filed a motion to strike all of WestNET's briefs and a CR 11 motion for sanctions against present counsel for representing WestNET, both of which were denied. CP 2114-2115.

Worthington then moved for reconsideration of the summary judgment orders. CP 2115-2115. In addition to the materials he filed with his motion to reconsider, he was granted leave to supplement the record further with records of forfeiture proceedings relating to WestNET investigations. CP 1186-1472; 1473-1762.

Counsel for WestNET filed a declaration pursuant to RPC 3.3(d), advising the court of an error she made in responding to a factual question by the Supreme Court at oral argument regarding the previous appeal. CP 2117-2174. After a fact-finding hearing the matter, the court found that the declaration did not present any genuine issue of material fact, and all prior orders remained in effect. Ultimately, Worthington's motion for reconsideration was also denied on January 22, 2016. CP1763-1765.

Worthington subsequently filed a CR 60(b) Motion to Vacate, again based upon the existence of forfeiture proceedings. CP 1778-1788. That motion was also denied. CP 2491-2492.

III. ARGUMENT

A. SUMMARY JUDGMENT IN FAVOR OF WESTNET WAS PROPER

The Court of Appeals reviews summary judgment motions de novo by engaging in the same inquiry as the trial court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In *Worthington v. WestNET*, the Supreme Court held that the determination on whether WestNET was an entity not subject to suit was a mixed question of law and fact, rendering the dismissal of WestNET by a CR 12(b)(6) motion inappropriate. *Worthington*, 182 Wn.2d at 512. The Court offered specific directed questions to be pursued in this regard: Were WestNET's actions consistent with their ILA non-entity designation? Would designation of WestNET as a non-entity defeat the purposes of the PRA? And, the court suggested in a footnote, if Worthington had named an incorrect party, would naming a correct party be the proper remedy as opposed to dismissal. *Worthington*, 182 Wn.2d at 508-11.

1. WestNET acted in compliance with its non-entity designation.

In conformity with the Supreme Court's direction, and after

discovery was conducted, WestNET moved for summary judgment dismissal as the undisputed facts revealed that the WestNET task force was acting in conformance with its nonentity designation and consistent with the terms of the interlocal agreement ("ILA"). Consistent with the terms of the ILA:

- All individuals associated with the task force remain employees of the contributing agency;
- Salaries and benefits of the individuals assigned to the task force are paid by the contributing member agency;
- WestNET hires and retains no employees;
- Day-to-day supervision may be tasked to an on-site WestNET member, but personnel assigned to the task force must conform to their own agencies' rules and regulations, and disciplinary matters regarding personnel assigned to the task force remain the responsibility of the contributing member agency;
- WestNET does not own or lease any facility;
- WestNET creates, generates and retains no investigative records of its own ;
- Reports of collaborative WestNET investigations are recorded and preserved as Kitsap County Sheriff's Office reports; and
- Requests for reports of WestNET investigations are responded to by the Kitsap County Sheriff's Office.

CP 1893-1897.

The facts reflect that WestNET operates just as the ILA envisioned it would. WestNET is simply a working agreement under which several agencies have organized their efforts to combat the fight against crime. They have not formed a new agency. Neither have they capitalized upon

the coordination of their efforts to obfuscate recording of their investigations. Indeed, by combining their investigative documentation into but one Kitsap County Sheriff's Office investigative report they have, if anything, streamlined the means by which a member of the public may access complete records of their investigative activities.

The inquiry which the Supreme Court directed leads to the same conclusion as was previously reached; the task force in fact behaves consistently with its nonentity designation, and is indeed an entity which is not subject to suit.

2. *Designation as a nonentity does not frustrate the purposes of the Public Records Act.*

Even though RCW 39.324.030(4) contemplates the formation of taskforces unamenable to suit, subsection .030(5) prohibits the contributing agencies from using that nonentity status to avoid other statutory obligations, such as PRA obligations. *Worthington,* 182 Wn.2d at 510. Accordingly, this "creates a question of both law and fact in which the reviewing court must determine whether enforcement of the agreement's terms (*e.g.* finding WestNET a 'nonentity') would effectively frustrate the purpose of the PRA." *Id.* Or, as the Court otherwise phrased it, "[e]ssentially, the inquiry should focus on whether an interested individual could still adequately exercise his or her rights under the PRA if

records requests and suits cannot be brought against WestNET directly." *Worthington,* 182 Wn.2d at 509.

The extensive records attached to Worthington's declaration provide a clear answer to the Supreme Court's question. The purpose of the PRA has not been frustrated here. Worthington has exercised and enforced his rights effectively, independent of his ability to bring a suit directly against WestNET.

Per the uncontested facts provided by Worthington, the February 5, 2010 first request was directed to a Kitsap County Sheriff's Office employee, Lt. Kathy Collings, and was responded to by a Kitsap County Sheriff's Office representative, who offered him an opportunity to make arrangements to come to the Sheriff's Office to view the requested records. CP 1893-1897.

He next complains of a second request, dated March 28, 2011, which was again sent to Lt. Collings of the Sheriff's Office, which he requested that she forward to Ms. Chittenden, also of the Sheriff's Office. CP 1893-1897. This request, too, was responded to by a Sheriff's Office representative. *Id.*

Worthington further complains of a May 23, 2011, public records request. This one, too, he sent directly to Kitsap County Sheriff's Office employee Kathy Chittenden. *Id.* He further challenges the several

responses he received, each of which were responses from Kitsap County Sheriff's Office employees. *Id.*

It is clear from the voluminous documentation that he has provided that Worthington was not thwarted in his efforts to identify where and how to access public records, and that he was fully able to adequately exercise his rights under the PRA. Even though he now attempts to pursue legal action against WestNET, at the time he sought to obtain the records of the task force's activities, he submitted the requests to Kitsap County Sheriff's Office employees who accepted his requests and responded. His own complaint reveals that his requests were not ignored. Abundant correspondence took place. Numerous records were provided. And ultimately a substantial settlement was negotiated. Acknowledgment of WestNET as a nonentity does not frustrate the purposes of the PRA, and in no way has the exercise of Mr. Worthington's rights been thwarted.

3. Worthington is collaterally estopped from naming Kitsap County as a party to the action

Although the Supreme Court suggested that if Worthington had indeed named the wrong party as the defendant, the remedy might not necessarily be dismissal, but amendment of the complaint to identify the real party in interest. *Worthington*, 182 Wn.2d at 509 n.7. However, because of Worthington's negotiated settlement agreement with the

county, this remedy is not legally available to him. By execution of the settlement agreement and release of claims, Worthington discharged Kitsap County, its employees, officers, agents, successors, assigns and sureties from *all* claims, demands, causes of action, or forms of relief of any kind whatsoever, known or unknown, asserted or unasserted, and those injuries yet to be suffered, "that in any way arise out of facts related to, or resulting from ... or stemming from or related to the incident described in his 2007 claim for damage." As with his prior action filed under Kitsap County Superior Court Cause No. 11-2-09032-4, which he voluntarily dismissed, and his later action, filed under Cause No. 14-2-00474-7, which was dismissed by the court, pursuit of any such action would be in direct contradiction of the terms of the settlement agreement and release of claims where Worthington released Kitsap County from all claims arising from or *related to* the "raid" on his residence. Having released and discharged Kitsap County from all such claims, Worthington cannot now revise his complaint to name Kitsap County as a defendant in this action.

Moreover, in addition to the preclusion caused by the terms of his settlement agreement with the County, the Court's Order in Kitsap County Superior Court Cause No. 14-2-00474-7 collaterally estops Worthington from pursing such claims against the County at this time. The Court's

findings of fact and supplemental conclusions of law in that case specifically found that pursuit of identical public records claims violated the terms of Worthington's settlement agreement with the County, and that Worthington was collaterally estopped from pursuing the same. CP 1899-1902; 2035-2040. Accordingly, Worthington is estopped, by both settlement agreement and court order from amending his complaint to name Kitsap County as a party.

4. Argument regarding the State of Washington as a real party in interest was not raised in the trial court and is waived.

For the first time on appeal, Worthington argues at Point L of his brief that the State of Washington is a real party of interest and that the trial court erred when it did not so rule. Appellant's 2nd Amended Opening Brief at 47. However, Worthington identifies no part of the record where any such motion was made, nor does he identify any such ruling by the trial court. An argument raised for the first time on appeal will normally not be reviewed absent unusual circumstances. *Savage v. State*, 72 Wn. App. 483, 495 n.9, 864 P.2d 1009 (1994), *reversed in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995); *see also* RAP 2.5(a). Worthington has identified no such unusual circumstances.

B. WORTHINGTON'S SUMMARY JUDGMENT MOTION WAS PROPERLY DENIED

Worthington's Summary Judgment motion was properly denied, because under no set of facts could he establish the elements of the claims for which he sought judgment.

In his first amended complaint, Worthington described his suit as "an enforcement action pursuant to the Public Disclosure Act, RCW Ch. 42.56 to compel disclosure of public records, and conduct an in camera review of redacted documents." CP 1-11. His complaint further asserted that he was seeking "full disclosure of all documents pertaining to the police action against John Worthington and Steve Sarich on January 12, 2007." His complaint explained that his public records request was first made in February of 2010.

In his complaint, Worthington sought a finding that WestNET was subject to the provisions of the Public Records Act, and as a remedy, per the act, he sought the imposition of a fine for any unlawfully withheld record, as well as an in camera review of documents identified in a redaction log.

However, in his motion for summary judgement, Worthington sought summary declaratory judgment in his favor regarding the following declaratory assertions:

1. That WestNET is collaterally estopped from claiming it is not subject to the Public Records Act;

2. That WestNET functions as a records center for WestNET affiliates;

3. That Worthington is not required to resort to WestNET's unpublished PRA procedures; and

4. That WestNET has violated the PRA in bad faith to avoid disclosing the fact that WestNET raided Worthington not the DEA.

CP 12.

As a remedy, per his summary judgment motion, he now sought the imposition of fines and penalties in the amount of $192,500 for what he claimed to be acts of bad faith related to the alleged cover-up of a phony DEA raid that began in 2008, two years prior to the public records request that is the subject of his lawsuit. CP 12, 27-28.

Worthington's request for summary judgment properly failed because the complaint set forth no cause of action for declaratory relief. The complaint lacked citation to any statute or court rule under which authority for any declaratory relief could be granted. *See*, Uniform Declaratory Judgments Act, RCW Ch. 7.24. Further, the specific "declarations" that he asked the trial Court to make were identified nowhere in the complaint. Nor were they identified in any other manner as a cause of action against the defendant.

Under CR 56, a party seeking to recover upon a claim may move for summary judgment in his favor. But here, Worthington sought judgment on claims not set forth in his complaint; sought judgment of a nature not authorized by the statutory authority upon which his claim was premised; and sought a remedy for actions that were neither described in his Complaint or were the subject of a cause of action.

Accordingly, the specific grounds upon which Worthington sought summary judgement were not claims upon which CR 56 allows such judgment to be entered. As such, Worthington's motion for summary judgement was properly denied, and de novo review warrants the same.

C. THE TRIAL COURT PROPERLY REFUSED TO STRIKE THE ENTIRETY OF WESTNET'S PLEADINGS BECAUSE ITS COUNSEL WAS A PROSECUTING ATTORNEY

WestNET has been unable to locate any precedent for a motion to strike the pleadings of a party in their entirety based upon the employment of their counsel of record. Generally, however, the abuse of discretion standard applies to review of a trial court's decision on a motion to strike a declaration or affidavit allegedly containing inadmissible evidence. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 247, 178 P.3d 981 (2008). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for

unreasonable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Before the trial court, as he did in this Court, Worthington moved to strike all of WestNET's pleadings because it was represented by an attorney who was employed as a Kitsap County Deputy Prosecutor. CP 620-637. Further, he argued that "all WestNET jurisdictions" should have been compelled to intervene instead of allowing WestNET to enter a notice of appearance and then seek dismissal. *Id.* Worthington sought sanctions for these alleged violations. *Id.*

1. Worthington offered no authority in support of his motion to strike.

Worthington has offered no rule, statue or case law that would support his contention that the court has or had authority to strike the entirety of WestNET's pleadings in this matter, simply because its counsel was a deputy prosecuting attorney. Similarly, he has failed to offer any foundation to establish his standing to object to the nature of his opposing counsel's employment. Absent any authority to the contrary, an abuse of the trial court's discretion in failing to strike all of WestNET's pleadings cannot be established.

2. The facts supported the trial court's discretion in refusing to strike all pleadings.

As explained to the trial court, as well as to the Supreme Court

during oral argument, the interlocal agreement that created WestNET provided that each member agency was responsible for its own actions. CP 1941-1961. Additionally, each agency has agreed to hold harmless, defend, and indemnify the other parties to the agreement in any action arising from the acts of that agency's employees. *Id.* Thus, when WestNET was named as a defendant in this action for the alleged public records violations of Kitsap County Sheriff's Office employees, it was the County's responsibility to defend against the claims.

A claim that pleadings filed on behalf of WestNET should have been stricken is without factual or legal support. There are no grounds upon which to find the trial court abused its discretion in denying this request. Similarly, Worthington's argument that Kitsap County, an entity that was not party to this action, could have been compelled by the court to intervene is offered without any legal support or authority. Nor does such authority exist. In requesting an order commanding the action of an entity that is not a party to this suit, Worthington seeks an invalid exercise of the court's jurisdiction. *T.R. v. Cora Priest's Day Care Center*, 69 Wn. App. 106, 109, 847 P.2d 33 (1993).

In his brief Worthington argues for the first time on appeal that judicial estoppel precludes a deputy prosecuting attorney from representing WestNET and requires that all pleadings be stricken.

Appellant's 2nd Amended Opening Brief at 40-42. Judicial estoppel was never raised below, and therefore should be considered waived. An argument raised for the first time on appeal will normally not be reviewed absent unusual circumstances. *Savage*, 72 Wn. App. at 495 n.9; RAP 2.5(a).

D. TRIAL COURT PROPERLY DENIED IMPOSITION OF SANCTIONS BECAUSE PLEADINGS WERE WELL GROUNDED IN FACT AND LAW

This Court reviews the grant or denial of sanctions under CR 11 for an abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn. 2d 888, 903, 969 P.2d 64 (1998). In addition to his motion to strike, Worthington also moved for the imposition of sanctions upon WestNET's counsel, which the trial court denied. CP 2114-2115. Worthington fails in any way to articulate how the trial court abused its discretion in denying the imposition of sanctions for counsel's appearance on behalf of WestNET or her filing of pleadings on WestNET's behalf. Nor are there any facts to support such an argument. He fails to articulate how counsel's actions may have fallen short of the dictates of CR 11, and while he disagrees with the courts denial of his motion, he fails to articulate how the court's decision was manifestly unreasonable, exercised on untenable grounds, or for unreasonable reasons. *Blackwell*, 120 Wn.2d at 830. This

claim should be denied.

E. THE TRIAL COURT PROPERLY RULED THAT THE RPC 3.3(D) DECLARATON DID NOT GIVE RISE TO A MATERIAL QUESTION OF FACT

Subsequent to the summary judgment rulings discussed above, a matter was brought to defense counsel's attention that made it clear that her response to an inquiry by the Supreme Court during oral argument had been factually inaccurate. CP 2117-2119. Although the argument before the Supreme Court was with regard to the earlier CR 12(b)(6) dismissal, counsel was asked a factual question prior to the initiation of any discovery, and responded based on the information known to her at that time. Once she became aware of the inaccuracy, in accordance with the RPC 3.3, she filed a declaration in the trial court to correct the inaccuracy:

> At oral argument before the Supreme Court, I was asked if WestNET had ever appeared voluntarily as a plaintiff or a petitioner in any action. Specifically the court asked if WestNET had filed any forfeiture actions. Based upon the language of the Interlocal agreement, my independent investigation and my knowledge of the facts at that time, I represented to the court that WestNET had not ever affirmatively initiated any action; that when forfeiture actions were filed, related to WestNET drug task force investigations, they were filed on behalf of the underlying agency who seized the evidence.
>
> My representation to the Court in this, and in all regards, was based on my absolute belief in the truth of my statements.

> Yesterday, October 26, 2015, I discovered that Deputy Prosecuting Attorneys who were involved in drug forfeiture proceedings related to WestNET drug task force operations had in the past filed pleadings in those actions which indicated that they (the Deputy Prosecuting Attorneys) were representing WestNET, as opposed to the underlying WestNET member agency or employee, and that the forfeiture proceeding was brought by WestNET, rather than, again, the underlying WestNET member agency.
>
> As of today's date, I have made corrective measures within my office and have every reason to believe any future appearance made by my office on such cases will correctly reflect that the forfeiture action is sought by the seizing agency and that legal representation is on behalf of that person or agency, not WestNET; in compliance with the language and intent of the Interlocal Agreement.

CP 2117-2119.

On receipt of the RPC 3.3 declaration, the trial court ordered briefing and argument on the limited question of whether the information contained in the declaration gave rise to any genuine issue of material fact. Upon full briefing and hearing the court ruled that no material question of fact had been raised. CP 1772-1774.

Worthington has made no showing that the court abused its discretion in this rendering this decision. Nor can he. The record reflects that the court's decision was well grounded in fact. Worthington has not argued nor could he establish that the Court's decision in this regard was "manifestly unreasonable, exercised on untenable grounds, or for unreasonable reasons." *Blackwell*, 120 Wn.2d at 830.

The inaccuracy in counsel's prior response to the Supreme Court that she brought to the trial court's attention through the declaration related to actions taken by the Kitsap County Prosecuting Attorney's Office, and not the WestNET taskforce. And, while potentially confusing, these facts, when fully explored, properly had no bearing upon summary judgment rulings in this case.

1. The interlocal agreement (ILA) provides for seizure and forfeiture in WestNET's operations.

It is contemplated by the ILA that the drug taskforce's operations would lead to the seizure and forfeiture of property. Indeed, provisions of the ILA address whether such property seized and forfeited in a taskforce operation should be retained and used by the taskforce, or sold to generate cash for taskforce purposes. CP 1947. Additionally, ILA provisions address how such property and proceeds forfeited pursuant to RCW 69.50.505 should be managed and disbursed. *Id.* Similarly, the ILA defines the "WestNET Fund" as "the account within the Kitsap County Treasurer's Office, which is administered by the Kitsap County Sheriff for the purpose of receipt and disbursement of drug forfeiture funds." CP 1942.

With regard to the forfeiture proceedings themselves, the ILA provides that the Office of the Kitsap County Prosecutor is to "represent

the Cities, Kitsap County, and the State in real and personal property forfeitures and drug nuisance abatement proceedings initiated by Task Force assigned personnel." CP 1945. Clearly it is contemplated by the ILA that while property may be seized during drug taskforce operations (*i.e.* the combined efforts of the various municipalities and agencies), forfeiture proceedings would be initiated by assigned personnel, and the Prosecuting Attorney's Office would represent that agency (*e.g.*, the Kitsap County Sheriff's Office). Of note, the Office of the Kitsap County Prosecuting attorney is *not* a member agency of the ILA.

2. Forfeiture proceedings were initiated by member agencies, not WestNET.

As he argued to the trial court, Worthington relies here on pleadings associated with numerous forfeiture proceedings to urge that a question of fact had been raised as to WestNET's capacity as legal agency subject to suit. However, upon closer scrutiny, the issue raised regarding forfeiture pleadings related only to the actions of an agency outside of the taskforce; the actions of WestNET itself remained in accordance with the terms of the ILA.

As this Court will recall, after the CR 12(b)(6) dismissal upon a finding that WestNET was not a legal entity subject to suit, the Supreme Court remanded this case, indicating that the trial court "cannot rely solely

on the self-imposed terms of an interlocal agreement because the document does not reveal whether the task force, in fact, behaves consistently with that non-entity designation." *Worthington*, 182 Wn.2d at 508. Therefore discovery ensued and a summary judgment motion that followed addressed whether there were disputed facts regarding WestNET's actions in this regard. The trial Court found there were not.

Subsequent to the summary judgment ruling, the court and parties became are aware of forfeiture proceedings where pleadings had been submitted in the name of WestNET. Certainly on their face, these pleadings, viewed in a vacuum, could give the appearance that the WestNET task force moved on its own in administrative proceedings, and arguably acted as a legal entity.

However, no matter can be viewed in a vacuum. In the Declaration of Batrice Fredsti, the forfeiture pleadings submitted in Worthington's declaration were organized into cases, sorted chronologically, and supplemented with the notices of seizure and intended forfeiture and notices of administrative hearing for each case Worthington included. CP 2124-2439. The organization of the documents in this manner readily answers the Supreme Court's question of "whether the taskforce, in fact, behave[d] consistently with that non-entity designation?" And, as it has in all other aspects, WestNET

complied not only with the spirit, but the letter of the interlocal agreement, and its non-entity designation.

As described above, by the terms of the ILA, property seizure as a consequence of task force operations was contemplated and initiation of forfeiture proceedings was the responsibility of assigned personnel. Through closer scrutiny of the materials submitted by Worthington, in conjunction with the respective notices of seizure and notice of administrative hearing, which precede forfeiture pleadings, it is apparent that WestNET was acting in accordance with the terms of the ILA. In those instances where a "Notice of Seizure and Intended Forfeiture" was sent to a person whose property had been seized, it was sent on Kitsap County Sheriff's Office letterhead. The notices advised the involved individual that the property had been seized by the West Sound Narcotics Enforcement Team, and asked for notification if that party claimed ownership of the property. The only contact information provided in the notice was that of the Sheriff's Office. Additionally, the notice is printed on letterhead-style paper with the address and phone and fax number of the Kitsap County Sheriff's Office printed on the bottom of the page.

Moreover, in those instances when no resolution was reached with the person contacted and an administrative hearing was noted at the interested party's request, *in accordance with the terms of the Interlocal*

Agreement, the Notices of Hearing were *all* captioned "Re: Kitsap County Sheriff's Office, West Sound Narcotics Enforcement Team (WestNET) v. [Party]." Additionally, the text of the notices indicated that there would be a hearing to determine if property seized by "the Kitsap County Sheriff's Office, West Sound Narcotics Team, should be forfeited to the seizing agency," and the notice of hearing letters were all signed on behalf of "Stephen A. Boyer, Kitsap County Sheriff." The letters all also have the Sheriff's Office address and telephone number on the bottom, and include the same stationary-type footer information as described above.

Thus, the documents in question all reflect that the actions of the WestNET member agencies, and of their employees appointed to work with the task force, were in accordance with the non-entity designation of the interlocal agreement (ILA). To the extent forfeiture proceedings were initiated against property seized during WestNET operations, the seizure and hearing notices were all issued by and on behalf of a member agency, the Kitsap County Sheriff's Office, as contemplated by the ILA.

The only discrepancy arose when the prosecutor's office, *a non-member agency*, subsequently generated pleadings from template forms, and filled in the blank for the moving party as simply "West Sound Narcotics Enforcement Team" or "WestNET" as opposed to "Kitsap County" or "Kitsap County Sheriff's Office, West Sound Narcotics

Enforcement Team" as had been properly set forth in the notices issued by WestNET members.[4] CP 2440-2442.

In granting WestNET's summary judgment motion, the trial court determined there was no material question of fact when considering whether WestNET's actions were consistent with the designated non-legal entity status of the ILA. WestNET's actions were consistent; the Prosecuting Attorney's actions do not alter this. WestNET did not hire people; it did not pay any salaries; it did not discipline member personnel; it did not own or lease any facility; and it did not create, generate or retain investigative records of its own. Its collaborative investigations were recorded and preserved as Kitsap County Sheriff's Office reports; public requests for reports of its collaborative investigations were responded to by the Kitsap County Sheriff's Office; notices of seizure and intended forfeiture were generated by the "Kitsap County Sheriff's Office, West Sound Narcotics Enforcement Team" on Kitsap County Sheriff's Office letterhead; forfeiture hearings were scheduled and noted on behalf of the Kitsap County Sheriff's Office, West Sound Narcotics Enforcement Team; and notice of such hearings were issued and signed on behalf of the Kitsap County Sheriff. Clearly, actions taken by the task force were

[4] Despite the apparent discrepancy in the 'fill in the blank' name of the moving party, no issue was raised regarding the handling of the proceeds of the forfeited property in accordance with RCW 69.50.505

consistent with its non-entity designation.

The only inconsistent actions were made by a non-member agency, the Prosecuting Attorney's Office, which used the incorrect name of the moving party in administrative pleadings by naming WestNET or the West Sound Narcotics Enforcement Team instead of the Sheriff's Office, or the Sheriff's Office West Sound Narcotics Enforcement Team as the moving party. As it related to the forfeiture proceedings, this distinction had no significance, and was nothing more than semantics. [5]

Be that as it may, can it be said that the actions of anyone or anything other than WestNET can impact the status of WestNET as a legal entity? The Supreme Court did not remand with the directive to ask "what does everyone else think WestNET was?" The parties to the ILA articulated their intent to not create a separate legal entity. The court has directed an inquiry to determine if it was acting consistently with its non-entity status. It and its member agencies and their employees were. Should the fact that someone from outside of WestNET erroneously labeled them something different change the nature of what it is? Were

[5] Worthington urges that because counsel admitted WestNET existed as an entity, she thereby conceded to WestNET's Public Records Act obligations under state law. Worthington takes Counsel's statements out of context. In their entirety, Counsel's statements were a confirmation that WestNET existed as a drug taskforce/agency, but a reaffirmation that it did not exist as a legal agency and that the question to be answered was whether or not it was acting in conformance with that non-legal status. The oral argument was clearly not intended as a legal concession on the merits of the claim against the client counsel was defending. *See* RP (11/30/15) 3.

that the case, simply Worthington saying that WestNET was a legal entity would be sufficient. Yet we know it is not.

There is nothing in the record submitted that would indicate that WestNET took any action above and beyond that which was contemplated by the non-entity status conferred by the ILA. From the formation of the working agreement, through the joint investigations, to Sheriff's Office's notices of seizure and notices of administrative hearing, every action by the taskforce and its members was consistent with the ILA.

As is so often true, in the light of a different day, we see things differently. It is apparent now that for many years a repeated error was made, not by WestNET, but one by the Kitsap County Sheriff Office's counsel. It was an error that in the context within which it was made amounted to little more than a scrivener's error; it had no apparent legal significance. Here, with a twist and a flourish, it is offered to this Court as against the entity that did not make the error, in order to change the complete nature of that organization, and to give that organization legal status that was never intended and which it did nothing to cause for itself.

3. Initiation of forfeiture proceedings does not connote legal entity status.

Despite the foregoing, even had the WestNET drug task force purposefully filed forfeiture proceedings in its own name, such action

would have had no bearing upon the issue of its status as an entity of legal or non-legal status. RCW 69.50.505, the statute pertaining to controlled substance-related property seizure and forfeiture, requires the law enforcement agency that seized the property to provide notice of seizure and to provide an opportunity for hearing to any person who claims ownership or a right to possess the property. The statute provides that the hearing will be before the chief law enforcement officer of the seizing agency or an administrative law judge. RCW 69.50.505. In such an instance, the moving party seeking forfeiture would necessarily be the seizing law enforcement agency.

Thus, the statute clearly gives any sheriff's department that has seized property a statutory right to pursue proceedings for forfeiture under the authority of RCW 69.50.505. Yet a sheriff's department is not a freestanding legal entity that is subject to suit. Washington courts have made clear that county departments are not legal entities subject to suit. "[I]n a legal action involving a county, the county itself is the only legal entity capable of suing and being sued." *Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792 (1990).

Thus, RCW 69.50.505 grants authority for entities which *are not* free-standing legal entities capable of suing and of being sued to pursue forfeiture actions. Thus, even if WestNET were to have pursued property

forfeiture proceedings, it would give rise to no question of material fact regarding its status as a legal or non legal entity.

F. THE TRIAL COURT PROPERLY REFUSED TO RECONSIDER ITS PRIOR RULINGS BECAUSE NO NEWLY DISCOVERED EVIDENCE, WHICH COULD NOT PREVIOULSY HAVE BEEN DISCOVERED, WAS PRODUCED

On October 20, 2015, Worthington filed for reconsideration of the trial court's orders regarding summary judgment and of his motion to strike. CP 713-732. In his motion, Worthington asserted that he was not asserting a "new theory." He claimed instead that he was just supporting his theory with new arguments. CP 721. The motion to reconsider essentially relied on the information regarding forfeiture proceedings that is discussed in the section above, and that the money was deposited to an account for the benefit of WestNET. Worthington claimed that as a *pro se* litigant, he should be allowed leniency in the late discovery of this information, nearly four years after filing his case. CP 720.

With the trial court's leave, Worthington was allowed additional time to explore this theory and supplement the record further. He thus filed a supplemental declaration on January 15, 2016, to which he attached copies of the checks he had referenced earlier. Granting Worthington leniency, and after consideration of Worthington's supplemental materials and arguments, the court properly denied his motion for reconsideration.

A trial court's denial of a motion for reconsideration is reviewed for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). "A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons." *Davies*, 144 Wn. App. at 497. "An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court." *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987).

The trial court here did not abuse its discretion. A party is entitled to reconsideration of rulings where there is "[n]ewly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). Courts have recognized that "a summary judgment hearing afford[s] the parties' ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Wagner Dev. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999). The check evidence cannot be considered to be newly discovered evidence that a party could not with reasonable diligence have discovered and produced at the trial. CR 59(a)(4).

Regardless of whether the Worthington's supplement information

could have been available to him earlier, the court allowed him time to supplement the record, and after full consideration of his supplemental information, the court determined no material question of fact had been raised as to whether WestNET's actions were consistent with its non-legal entity status. As per the discussion above, because it was an entity *outside* of WestNET that made the error in naming WestNET as the moving party in the forfeiture actions, because, by the authority of RCW69.50.505 forfeiture proceedings may be initiated by a non-legal entity, such as a sheriff's office or police department, and because such entities can have and maintain bank accounts and deposit money therein, no abuse of discretion can be shown in the trial court's determination that a material question of fact regarding WestNET's status had not been raised.

G. THE COURT PROPERLY DENIED THE CR 60(B) MOTION TO VACATE ORDERS

The standard of review regarding the trial court's denial of Worthington's CR 60 motion to vacate the prior orders regarding summary judgment, his motions to strike and for imposition of sanctions is for abuse of discretion. *Gustafson v. Gustafson*, 54 Wash. App. 66, 69, 772 P.2d 1031, 1033 (1989). Worthington argues only that the court erred in failing to accept transcripts of forfeiture proceedings that he offered as evidence in support of his motion to vacate. Appellant's 2nd Amended

Opening Brief at 59.

However, in accordance with the CR 60 standard, the trial court noted that Worthington had failed to make a showing of why the transcripts could not have been discovered by due diligence at an earlier date. It further noted that while Worthington called the transcripts "new," the substance of the transcripts went to the same point that had previously been addressed in Worthington's motion to reconsider and in the hearings related to the RPC 3.3 disclosure, and thus would be unlikely to change the result. RP (3/18/16) 14. Accordingly, the court determined the evidence to cumulative and not material. *Id.*

The court additionally specifically considered and rejected Worthington's contentions of fraud on the part of opposing counsel; finding that Worthington had not made a prima facie case to connect his allegations regarding counsel's actions and his claims of a fraud upon the court. RP (3/18/16) 15. Worthington's argument in this regard is nothing more than a summary allegation that the court was incorrect. He does not, and cannot, establish that the court's decision was manifestly unreasonable or based on unreasonable grounds.

H. THE TRIAL COURT DID NOT RULE THAT THE ILA CONTAINED PUBLIC RECORDS PROCEDURES FOR WESTNET

At Point E of his brief, Worthington incorrectly asserts that the

trial court "extracted" WestNET public records procedures from the ILA, and claims that to do so was in error. Appellant's 2nd Amended Opening Brief at 23. For this misconception of what took place, Worthington refers to the report of proceedings at RP (9/25/15) 16-17.

A review of this portion of the record reveals that at the September 25, 2015, hearing, the court was not addressing public records issues, but instead was hearing Worthington's motions to dismiss all pleadings because counsel did not have the right to represent WestNET, to require other jurisdictions listed in the ILA to intervene, and to sanction the DPA and the Prosecutor's Office. *Id.* The Court's quote from the ILA that Worthington references was a part of the court's explanation to him of why the Kitsap County Prosecuting Attorney's Office appeared to be the logical choice for legal representation of WestNET.

The excerpt had nothing to do with public records procedures, nor was it a ruling by the court that the ILA contained public records procedures for WestNET.

I. THE TRIAL COURT DID NOT RULE THAT A SETTLEMENT AGREEMENT BETWEEN WORTHINGTON AND KITSAP COUNTY WAS A VALID CAUSE FOR DISMISSAL

At Point K of his brief, Worthington incorrectly asserts that the trial court relied on a settlement agreement as valid cause for summary

judgment. Appellant's 2nd Amended Opening Brief at 42. However, he fails to identify any part of the record where he alleges the court made any such ruling. Indeed the record is devoid of any such ruling.[6]

J. THE TRIAL COURT DID NOT RULE THAT WORTHINGTON WAS COLLATERALLY ESTOPPED BY CASE NO. 14-2-00474-7

At Point O of his brief, Worthington incorrectly asserts that the trial court ruled that "case no. 14-2-00474-7 collaterally estopped" him (though he does not say from what). Appellant's 2nd Amended Opening Brief at 51. He further incorrectly asserts that the trial court ruled that Kitsap County could make settlement agreements for other member agencies of the WestNET task force. Worthington includes no citation to the record for these assertions, nor can any such record be found. No such rulings were made, and these incorrect assertions have no bearing upon any matter at issue before this court.

IV. CONCLUSION

For the foregoing reasons, the trial court's orders should be affirmed.

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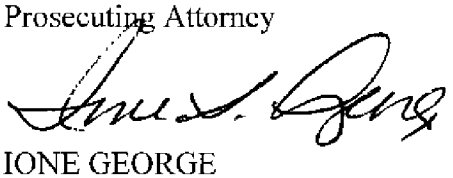
[6] See Part A(3), *supra*, for discussion regarding the settlement agreement and Kitsap County as a party.

DATED September 15, 2016

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



IONE GEORGE
WSBA No. 18236
Chief Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

John Worthington 4500 SE 2nd Place Renton, WA 98059 worthingtonjw2u@hotmail.com	[X] [X]	Via U.S. Mail Via Email:

SIGNED in Port Orchard, Washington this 5th day of September, 2016.

BATRICE FREDSTI, Legal Assistant
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